No. 13043

In The United States Court of Appeals

For the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS,
Commanding Officer,
Montana Induction Center,
Butte, Montana,

Appellee.

Brief of Appellee

On Appeal From the United States District Court
for the District of Montana

DALTON PIERSON,
United States Attorney,
Butte, Montana.

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STATEMENT OF CASE

The Appellant herein, Charles R. Neibauer, a registrant under the Selective Service Act of 1948, appeared at the Armed Forces Induction Station for Montana, at Butte, Montana, on June 14, 1951, in obedience to an order to report for induction on that date, issued by Local Board No. 3, Blaine County, Chinook, Montana, (R. 7, 23).

At the Montana Induction Station the Appellant was examined and found acceptable for service in the Armed

Forces, (R. 7). However, before Appellant could be inducted and before the induction ceremony had begun, his attorney, Jerry J. O'Connell, called the Commander of the Induction Station, Captain Max R. Harris, Appellee herein, by long distance telephone, from Helena, Montana, and represented to Captain Harris that he, O'Connell, was obtaining from the Honorable W. D. Murray, United States District Judge, who was holding Court in Helena, Montana on that day, a *Stay of Induction, and that the Court had requested that Appellant not be inducted* (emphasis supplied), (R. 24). This representation was completely false, (R. 25). Thereupon, no further steps were taken to induct the Appellant into the Armed Forces and he was in fact not inducted into the Armed Forces, (R. 24, 25). He was, however, requested to remain in Butte, and to remain in contact with the Appellee, Captain Harris, which he did, (R. 25).

Mr. O'Connell arrived in Butte on the afternoon of June 15, 1951, armed with a *Writ of Habeas Corpus* (emphasis supplied), (R. 25). It will be noted that Mr. O'Connell misrepresented the nature of the Writ he was obtaining. This misrepresentation enabled Appellant to avoid submitting to induction and not be subject to prosecution since Appellee withheld inducting Appellant in the belief that the Court desired Appellant not be inducted into the Armed Forces prior to issuance of the Writ Staying Induction, (R. 24, 25). After the Writ of Habeas Corpus was served upon the Appellee by a Deputy United States Marshal, counsel for the Appellant contacted Appellant, and they departed together from the Induction Station, (R. 25). At the time Mr. O'Connell

obtained the Writ of Habeas Corpus from the Court in Helena, the 19th of June, 1951, was set as the day when the hearing upon the Writ of Habeas Corpus would be had, (R. 9, 10).

It should be observed at this juncture that Appellant's opening brief alleges that the Court desired that the hearing set for June 19, 1951, be postponed and that at the Court's suggestion counsel for Appellant obtained a stipulation vacating the date of the hearing (Appellant's opening Brief 3, 4 and 9). Such statements are completely unfounded in that there is no basis for them in fact or in the record. They are false and this Court is urged to disregard them. The true facts, which can be substantiated by Affidavit if desired, are that on June 15, 1951 in Helena, Montana, Mr. O'Connell was informed by the Court that the Court desired to have the matter heard on the day set because the Court was leaving afterward to attend a Judicial Conference for the Ninth Circuit, which conference was to be held in California. Despite the Court's express directions, counsel for Appellant, in Helena where the Court was still sitting on the 18th day of June, 1951, completely misrepresented the Court's wishes over the telephone to the United States Attorney, who was in Missoula at the time. The United States Attorney transmitted by telephone this false information to his Assistant in Butte where the stipulation prepared by Mr. O'Connell, which ignored and flouted the Court's express Order and desire to hold the hearing June 19, 1951, was signed by the Assistant United States Attorney. The misrepresentation inducing the signing of this stipulation by the United States Attorney and

by the Assistant United States Attorney was that the Court, since it wished to leave for California, desired that the hearing be put over until a later date to be set by the Court. Had the United States Attorney and the Assistant United States Attorney known the true facts, the stipulation would never have been signed by them. No Order was prepared by counsel for Appellant for the Court to sign vacating the hearing. No Order was ever submitted to the Court to sign vacating the date of hearing in Helena, on June 19, 1951, and no Order was ever agreed to be submitted, or prepared, by the United States Attorney or the Assistant United States Attorney vacating the prior setting of the hearing to be had in Helena, on June 19, 1951. The Court held the hearing on June 19, 1951 as ordered and in accordance with its intentions as expressed to Mr. O'Connell on June 15, 1951.

At the hearing held on that date, it affirmatively appeared that the Appellant had never been inducted into the Armed Forces and was still a civilian and had never been physically restrained against his will by the Appellee herein, Captain Harris. These facts, even now, are undisputed by Appellant. As a result of the showing made in Helena, on June 19, 1951, the Court ordered the petition for Writ of Habeas Corpus dismissed and ordered the Writ of Habeas Corpus dissolved, (R. 12, 13, 25). Counsel for Appellant then later obtained a Stay of Induction from another Judge of the same Court, and then noticed an Appeal to the United States Court of Appeals for the Ninth Circuit to have the action of the Trial Court reviewed, (R. 14, 16 - 18).

ARGUMENT

Appellant's first specification of error is that "The Trial Court erred in proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court; (Tr. 11, 22, 23)." (Br. Appellant 7.) With reference to Appellant's first specification, the Record clearly discloses that the error, if any, was committed by Appellant's counsel in disregarding the explicit instructions of the Court that the hearing would be held in Helena on June 19, 1951 (R. 9, 10), in misrepresenting the true state of affairs to the United States Attorney and to his assistant, and in relying upon a stipulation attempting to regulate the Court's conduct, without first ascertaining whether the Court approved such stipulation and would be bound by such stipulation.

It should be borne in mind that the present case is one in which a stipulation was filed attempting to regulate the conduct of the Court in that it purported to vacate a hearing set by the Court, and that no approval by the Court of the stipulation was ever sought or obtained by either side. It is not a case where counsel for one side or the other attempted to avoid a stipulation freely and voluntarily entered into with full knowledge of all facts, nor is it a case in which the Court refuses to honor a stipulation which should be binding on the Court in that permissible subject matter was stipulated by both parties

who were in full possession of all facts. This case, rather, is one in which counsel for Appellant through misrepresentation of fact to counsel for Appellee attempted to evade the Court's express directions to counsel for both sides as manifested in a Court order (R. 9, 10), and to nullify the said Court order without obtaining approval of the Court. This is not a situation as suggested by counsel for Appellant where the Court later changed his mind, or where counsel for Appellee attempted to evade an agreed stipulation, but instead this is a situation in which counsel for Appellant was unsuccessful in an attempt to perpetrate a fraud and trick upon the Court.

While it is true that language in the cases cited by Appellant in his opening brief, pages 9, 10, is to the effect that stipulations of attorneys made during a trial may not be disregarded, a distinction should be made between stipulations of fact made during the course of a trial or other stipulations which do not unreasonably interfere with the course of conduct that a court might, and should, pursue, and the present situation. The case of *Maryland Casualty Company v. Richenbacher, et al.,* 146 Fed. (2d) 751, cited by counsel for Appellant, in his opening brief at page 9, which involved a stipulation of fact made during the course of a trial, is clearly distinguishable from the present case. The case of *Dunscombe v. Smith*, 190 Southern 796, 139 Fla. 497, cited by counsel for Appellant in his brief on page 10, involved a situation where counsel on one side desired relief from a previous stipulation. Again, this is not the situation here. In *United States v. Columbia Steel Company, et al.,*

(1947) 71 Fed. Supp. 734, a stipulation was filed, which if binding on the Court, would have limited the terms and the extent of any preliminary injunction which the Court might grant in the case. The Court, in disposing of the contention that the stipulation, which was not approved by the Court, was binding upon the Court in that it could restrict the acts of the Court, had this to say,

> "The 'stipulation' itself, being merely the ex parte action of the defendant, would be ineffective unless it was approved by the Court and its terms expressly or tacitly adopted by the Court and the defendant required to comply therewith." 71 Fed. Supp. at Page 736.

It was held in the case of *Baucos v. Riveroll* (1938) 272 Pac. 760, that the action of a court in disregarding a stipulation entered into between parties to an action is a discretionary matter and that its action in so doing would be disturbed on appeal only when it clearly appeared that the order was the result of an abuse of discretion. The rule would seem to be, then, that in matters relating to the individual rights and obligations of the parties among themselves and in matters pertaining solely to questions of fact, stipulations entered into between the parties will be honored by the Court and will be binding on the Court. However, in a matter affecting the power of the Court to act, stipulations entered into between the parties will not be binding upon the Court unless approved by the Court. See generally 60 *Corpus Juris* Sections 19, 36. In *Hartford Nat. F. Ins. Co. v. Burton,* (Ind. App.) 168 N. E. 37, it was said:

> "Orders of the Court are not made alone for the convenience of the litigants to be set aside by them at their own behest and to satisfy their own caprice, without regard to the interruption of the Court which their action may occasion, but are made as well for the expedition of the proceedings of the Court, and are not to be modified or annulled except by the knowledge and consent of the Court."

In the *Hartford* case, an agreement between the parties to hold in abeyance an order of the Court and for which approval of the Court was not secured, was held to be improper.

The value of the Writ of Habeas Corpus rests in the fact that the Court will hear and promptly act upon a petitioner's claim that he is being unjustly and illegally restrained of his liberty. In view of the important role that a speedy hearing under a Writ of Habeas Corpus plays in the due and orderly administration of justice, it would seem to be axiomatic that an ex parte stipulation entered into by the parties to the action could not be binding upon a Court without its consent in determining when to hold a hearing on the Writ of Habeas Corpus. The Court should not be forced to countenance delaying tactics without its approval in a matter so fundamental and of such vital importance as a hearing on a Writ of Habeas Corpus. Appellant should not be heard to complain therefore, that the stipulation was ignored in view of the fact that the stipulation was never approved by the Court and in fact was expressly disapproved by the Court before it was submitted, in that the Court had informed counsel for Appellant that the Court desired the matter heard on the 19th of June, 1951, and had so

ordered (R. 9, 10). Certainly then Appellant assumed the risk that his stipulation would not be honored when he failed to appear in Helena on June 19, 1951, in view of the fact that he had not obtained Court approval of his stipulation and knew the Court desired the matter to be heard when and as ordered by the Court on June 15, 1951. It is urged that the error, if any, is Appellant's, since he assumed the risk of failing to be present in Helena on June 19, 1951, and cannot be imputed to the Court or Appellee. Counsel for Appellant should not be permitted to profit by his scheming at the expense of the administration of justice.

Appellant's second specification of error is that the Trial Court erred in failing or refusing to determine whether the petitioner or his attorney of record had actual or constructive notice that the stipulation of counsel filed in the case was to be disregarded and the hearing proceed as scheduled, (Br. Appellant, page 7). Appellant's attorney of course had notice that the hearing would proceed as scheduled because no Order was ever entered vacating the hearing to be held in Helena, on June 19, 1951, and counsel for Appellant well knew this fact in view of the fact that counsel for Appellant prepared the stipulation and did not prepare any Order, nor was any agreement made with the United States Attorney or the Assistant United States Atttorney, that an Order be prepared and submitted to the Court to be signed. Counsel for Appellant further had notice that the hearing would be held, because he had been told by the Court on June 15th, that the Court desired the hearing to be held on the 19th day of June, 1951, before

the Court left for California, since if it were not held on that date, the Court could not hear the petition until the Court returned from a Judicial Conference in California. In view of these considerations, it is difficult to see how counsel for Appellant could have relied on the said stipulation and gone about his business without first ascertaining whether the Court approved vacating the hearing which had been set for June 19, 1951.

With reference to Appellant's specification of error No. 3, it is submitted that the Trial Court did not err in proceeding to hear the above cause in the absence of the petitioner and his attorney of record, who relied on the stipulation entered into between counsel for both sides, because the attorney for petitioner knew that the Court desired the hearing to be held in Helena on June 19, 1951. The attorney for petitioner knew that no Order had been signed by the Court approving this stipulation which was on file and the attorney for Appellant had no reason to believe that the Court would approve the stipulation in face of the Court's order and explicit directions to petitioner that the hearing would be held on June 19, 1951, (R. 9). If Appellant was hurt by relying upon a stipulation secured through misrepresentation and in direct disregard of the Court Order (R. 9), the error is not the Court's and is not the error of counsel for Appellee, but is rather that of counsel for Appellant.

Despite the scheming of counsel for Appellant, an attempt, in good faith, was made to locate counsel for Appellant. His office was called long distance by the office of the United States Attorney, and the girl in his office was informed that it was of vital importance that

the United States Attorney get in contact with counsel for Appellant. She informed the counsel for Appellee that counsel for Appellant had gone to Kalispell and that he could be reached at either the Montana Hotel in Kalispell, or the office of an attorney in Kalispell, whose name was given to the United States Attorney. Both the Montana Hotel in Kalispell and the office of the attorney in Kalispell were called, both establishments in Kalispell informed the office of the United States Attorney that counsel for Appellant was not there and was not expected. It was further stated that counsel for Appellant had no reservation at the Montana Hotel, (R. 22). As counsel for Appellant has stated in his brief, page 12, "The distances in the District of Montana are vast," and when one goes from one town to another, especially on a trip of "250 miles," one does not leave on such a trip without informing those whom he intends to visit that he is coming, and without obtaining a reservation in the hotel there. Therefore when counsel for Appellee were informed that counsel for Appellant was not expected in Kalispell, and had no reservation at the Montana Hotel in Kalispell, counsel for Appellee had no other choice but to assume that counsel for Appellant could not be located in Kalispell. Counsel for Appellee had no notice and knew of no other place where counsel for Appellant could be located. Everything was done which could be done to locate counsel for Appellant. Again it is strongly urged that Appellant assumed the risk that the hearing would proceed as ordered and if Appellant and his counsel, relying upon a fraudulently secured stipulation, chose not to be in Helena on June 19,

1951, they are responsible for their actions. The fault cannot fairly be attributed to the Court or Appellee if Appellant gambles and loses.

Appellant's specification of error No. 4 urges that the Trial Court erred in failing to set the hearing on petitioner's Writ of Habeas Corpus for another date when a proper hearing with all persons present could have been had, without prejudice to either party and his rights. In support of his contention, Appellant cites the cases of *Walker v. Johnston*, 312 U. S. 275; *O'Keefe v. Johnston, Warden* (CCA 9th), 122 Fed. (2d) 554; *Dorsey v. Gill*, 148 Fed. (2d) 857, and *ex parte Rosier*, 133 Fed. (2d) 316. The rule of these cases, that a petitioner in a Habeas Corpus proceeding is entitled to be present and present testimony on controverted issues of fact, is undoubtedly proper and correct. However, these cases can hardly be applied to the situation here for the reason that they all stand for the proposition that a petitioner cannot be denied the *opportunity* to prove the truth of the allegations he makes, if controverted. The situation here is much different in that the Appellant has not been denied an opportunity to prove his allegations, but he simply failed to take advantage of the opportunity allowed him by the Court. A hearing was set by the Court for the 19th of June, 1951 of which Appellant had ample notice. Since he was not restrained of his liberty, Appellant could have attended the hearing if he wished, (R. 25). However, Appellant chose to rely upon the stipulation which had been fraudulently obtained by his counsel. In view of the fact that the stipulation was not approved by the Court, and that counsel for Appellant was in possession

of facts from which he well knew that the stipulation would not be approved by the Court, it would seem that Appellant in failing to appear in Helena on June 19, 1951, had assumed the risk that the stipulation would not be approved and therefore cannot be heard to complain that he was denied an opportunity to present evidence. The Record shows not a denial of the right to appear, but instead a failure to take advantage of the right through unjustified reliance on a stipulation unfairly obtained. It is clear, therefore, that the Appellant was not denied the opportunity to be present at the hearing and was not denied an opportunity to present evidence.

Furthermore, Appellant has not been harmed by his failure to appear at the hearing in Helena on June 19, 1951, because, as a reading of the Record will disclose, no controversial issue of fact has been developed in this case. A careful reading of petitioner's petition for Writ of Habeas Corpus (R. 3, 4, 5, 6, 7, 8) shows that the petition for Writ of Habeas Corpus was designed for one purpose, and that purpose was to test the validity of the Local Board's action under which Neibauer, the Appellant herein, was classified 1A, and under which he was ordered to report for induction in Butte, Montana. The petition, read as a whole, shows clearly that it was not intended to allege, and does not, in fact, allege that Captain Harris, Appellee herein, at any time actually or physically restrained Appellant of his liberty. Appellant's petition on its face shows that the only restraint urged by Appellant was that he was restrained under and by virtue of the order issued by his Local Board. The facts alleged by Appellant were not controverted by

any of the facts developed at the hearing held in Helena on June 19, 1951.

The hearing held there brought out, as alleged by petitioner, that he had arrived at the induction station in Butte, Montana pursuant to an order of his Local Board and that he had been examined and found acceptable for service in the Armed Forces of the United States. It was further shown that Appellant was not inducted into and is not a member of the Armed Forces (R. 24, 25). These facts which were developed at the hearing in Helena are entirely consistent with petitioner's petition for Writ of Habeas Corpus. Of course, no facts were developed regarding the validity of Appellant's draft classification by his Local Board and that issue was never reached because the petition on its face and the uncontroverted facts developed at the hearing, showed that the Appellant was not entitled to relief since a Writ of Habeas Corpus will not lie before induction and in any event the petitioner had not charged as respondents the Local Board members in whom his custody was vested by virtue of their order to report for induction. The Record plainly shows that the only issue in this matter was one of law and, of course, that being so it was not necessary for the Appellant to be present. See Title 28 U. S. Code, Sec. 2243 (printed in appendix). It is worthy of note that nowhere in his argument does counsel for Appellant suggest or urge that Appellant should have been produced at the hearing in Helena by Appellee. This, of course, recognizes the true fact as disclosed in the Record that Appellee herein did not have custody of the Appellant at any time and could not have produced the Appellant

at any hearing to be held anywhere (R. 25). The conclusion seems inescapable that, if Appellant failed to be in Helena on June 19, 1951, in accordance with the terms of the Order issued by the Court on June 15, 1951, the blame, if any, rests upon Appellant himself and not upon the Court or Appellee or counsel for Appellee. Counsel for Appellant was in full knowledge of all the facts, and if he relied upon the stipulation, Appellant and his counsel should be held to have assumed the risk that the stipulation would not be honored.

Appellant's specifications of error numbered 5, 6 and 7 indicate a basic confusion as to the Court's order dissolving the Writ (R. 12, 13). The order of the Court below can be supported upon two bases: (1) That a Writ of Habeas Corpus to test the validity of one's Selective Service classification will not lie prior to induction into the Armed Forces, and (2) assuming that a Writ of Habeas Corpus prior to induction will lie, in this case the petition for Writ of Habeas Corpus and the Writ were improper because directed at Appellee, rather than at the members of Appellant's Local Board in whose custody he was while acting under their order to report for induction. As a result of his confusion, Counsel for Appellant has failed to preserve for this appeal the second proposition upon which the lower Court's action can be sustained, and has only preserved for appeal the issue of whether a Writ of Habeas Corpus will lie in these circumstances prior to induction. He has not preserved the issue of whether the Local Board members must be named as respondents before the Writ will issue. It should be noted in this connection that Appellant in his opening

brief at pages 16, 17, 18, argues different error from that specified in his specifications of error numbered 5, 6, 7, (R. 32, 33). Appellant argues that the Writ of Habeas Corpus was directed at Appellee in his civil capacity in the Selective Service System and that the Court below was confused and erred in finding and concluding that a Writ of Habeas Corpus would not lie prior to induction and *could not* be *directed at Appellee in his civilian role in the Selective Service System* (emphasis supplied) (Br. Appellant 17). The Court will note that there is no specification of error in the record which will permit this issue to be argued by Appellant and it is urged that all of Appellant's brief dealing with the issue of whether a Writ of Habeas Corpus could be directed at Appellee by Appellant prior to induction be disregarded by the Court.

Counsel for Appellant in his argument, (Br. Appellant 16), states "it is now clearly settled law that actual induction into the Armed Forces of the United States is not required before Habeas Corpus will lie as the United States Supreme Court and this Court have pointed out time and time again." The true state of the law is exactly contrary to that stated by Appellant in that it is not clear at all whether Habeas Corpus will lie prior to actual induction into the Armed Forces of the United States. The case of *Estep v. United States,* 327 U. S. 114, was the first case in which it was determined that a person who refused to be inducted into the Armed Forces of the United States could raise the issue that he had been arbitrarily classified by his draft board. Prior to this time, the only method of judicially testing the validity

of a draft classification was by suing out a Writ of Habeas Corpus after induction. The Supreme Court in the *Estep* case, supra, of course, rightfully decided that as a defense in a criminal prosecution for refusing to be inducted into the Armed Forces of the United States, after he had exhausted his administrative remedies as outlined in *Falbo v. United States,* 320 U. S. 549, a defendant could show that he had been arbitrarily or capriciously classified by his Local Board and that the classification upon which the order to report for induction was based was void. Nowhere in the *Estep* case, supra, or in any of the other cases cited by the Appellant in his brief on page 16, is it ever suggested that Habeas Corpus would lie before induction into the Armed Forces. So far, the only two methods which have been judicially recognized by which a person may test the validity of his Selective Service classification are: (1) Habeas Corpus after induction into the Armed Forces, and (2) as a defense to a criminal prosecution for failure to submit to induction into the Armed Forces of the United States. See *Estep v. United States,* supra. In none of the cases cited by counsel for Appellant does it appear that the question of the availability of Habeas Corpus before induction into the Armed Forces was considered by the Court and nowhere is it intimated that such a procedure would be permissible. In fact, there are very strong reasons of policy in the administration of the Selective Service Act why it would not be wise to permit a person to sue out a Writ of Habeas Corpus to test the validity of his draft classification prior to induction into the Armed Forces. To permit the use of the Writ in this

manner would interfere unduly with the orderly processes of Selective Service.

Another reason why the Writ of Habeas Corpus was dissolved in the present case was that Captain Harris, as Commander of the Montana Induction Station was not the proper person to whom the Writ should be directed since he did not have custody of the Appellant. *Billings v. Truesdell,* 321 U. S. 542; *Jones v. Biddle,* 131 Fed. (2d) 853 Cert. den. 318 U. S. 784, see also Selective Service Regs., appendix. While Appellant has argued this point (Br. Appellant 17, 18, 19, 20), Specification of Error No. 8 does not adequately preserve this issue on appeal, hence, his contentions cannot be considered in this appeal. This argument, in addition to being unavailable to Appellant, is also untenable. Of course, it is true that in the *Billings* case and in the case of *Lawrence v. Yost* (CCA 9th) 157 Fed. (2d) 44, a Writ of Habeas Corpus prior to induction directed toward military officers lay, but it was only for the reason that the petitioners in those cases were actually and physically restrained of their liberty and held in detention by the military.

The distinction between Appellee's military role as an officer of the United States Armed Forces, and his civil role in the administration of Selective Service System, is one which is unfounded in reason and entirely lacking in authority. The case of *Billings v. Truesdell,* supra, cited by counsel for Appellant, is no authority for this proposition, and in fact holds exactly the opposite. In that case as previously mentioned, the petitioner was actually, unlawfully restrained of his liberty by force by members of the Armed Forces, who felt that he was

under their control, although not formally inducted into the Armed Forces of the United States. No case has been cited by Appellant and no case has been found in which a Writ of Habeas Corpus, directed at a military officer prior to induction, has lain, unless the officer actually and by force restrains the petitioner of his liberty. Such is not the case here as can be determined not only from the Record, but also from the petition for Writ of Habeas Corpus (R. 7, 8), and the testimony of Captain Harris, (R. 24, 25).

That such a distinction is untenable is borne out by the Selective Service Regulations, 1603.1-1603.8 (printed in appendix), and also by the testimony of Captain Harris, (R. 25), where he said:

> "I asked Mr. Neibauer to remain in Butte overnight, he had every right to refuse, he could have refused without my being able to stop him. I asked him if he wouldn't stay over 24 hours, until we heard from this Writ, which he did. He was in touch with us all the time . . . I withheld any further action on inducting Mr. Neibauer until the Writ could be served, which was about six o'clock that evening. At that time, of course, Mr. O'Connell got in touch with Mr. Neibauer and took him away."

If the case of *Billings v. Truesdell* holds anything, it is that up until the actual moment of induction an inductee is subject to the orders of his Local Board, is under civil jurisdiction and is not subject to the military in any way. Appellant's own petition for Writ of Habeas Corpus clearly discloses that while he was at the Montana Induction Station in Butte, Montana, he was obeying the

orders of his Local Board and was not obeying any orders of Captain Harris or any representatives of the Armed Forces, except as required to do by order of his Local Board, (R. 7), see also Selective Service Regulations, 1632. 14 (a) 1632. 14 (b) 1632. 15 (e) printed in appendix. While the law might be considered unsettled on the proposition of whether or not a Writ of Habeas Corpus, properly directed, will lie before the inductee is actually taken into the Armed Forces, it would seem to be clearly settled as a result of the *Billings* case, that a Writ of Habeas Corpus prior to induction, will not lie against a member of the Armed Forces unless such member of the Armed Forces actually and physically restrained the petitioner of his liberty. Of course, if the petitioner is seeking to challenge the validity of his Selective Service classification prior to being inducted into the Armed Forces, the proper persons to charge as respondents are the members of his Local Board, since, as the *Billings* case makes clear, they are the persons who have custody of the petitioner prior to his actual induction into the Armed Forces of the United States. Furthermore, they are the logical ones to defend the validity of the order they issued. It cannot be too strongly urged that this is not a case similar to that of *Billings v. Truesdell,* but is merely one in which the Appellant has sought a judicial review of his classification prior to induction into the Armed Forces. The Record clearly discloses that the Appellant was at no time unlawfully restrained of his liberty by Appellee herein, (R. 7, 24, 25).

With reference to Appellant's specification of error No. 9, it is submitted that the earlier portions of this brief

show that the dissolution of the Writ of Habeas Corpus and the dismissal of the petition for Writ of Habeas Corpus was properly ordered by the Court.

CONCLUSION

This Appeal, properly, should present only two questions for the determination of the Court and those being the issues whether (1) under the circumstances here a Writ of Habeas Corpus will lie prior to induction and, if so, (2) whether or not the Commander of the Induction Station is the proper person to whom the Petition for Writ of Habeas Corpus and Writ of Habeas Corpus should be addressed. Although Appellant has not preserved the second issue for purposes of appeal, nevertheless, the lower Court's action was proper on this basis. Counsel for Appellant has seen fit to interject other issues which, because of his mis-statements of fact, attention to which is called supra, cause this Appeal to appear, on the surface, at least, to involve serious questions of due process of law and whether such has been denied to the Appellant herein. It is most strongly urged that the Appellant herein was given every opportunity to appear in Helena on June 19, 1951, and was accorded every respect and every consideration by the Appellee herein, (R. 24, 25), by counsel for Appellee, and by the Court, (R. 9, 10, 11, 25). However, despite the consideration shown Appellant by the Court, and by Appellee and his counsel, counsel for Appellant, for purposes known only to himself, attempted to delay action on the Writ once his client was temporarily relieved from duty of submitting to induction into the

Armed Forces. Appellant who relied on a stipulation which was filed without obtaining approval of the Court, when counsel for Appellant well knew the Court was opposed to any delay in the hearing of this matter, assumed the risk that the hearing would proceed as scheduled.

Upon the misrepresentations of counsel for Appellant, the Court issued a Writ of Habeas Corpus which directed that the petitioner appear before the Court on the 19th of June, 1951, (R. 9, 10). Counsel for Appellant informed the United States Attorney that he was obtaining such a Writ, and the United States Attorney cooperated with counsel for Appellant in making certain that Appellant would not be inducted prior to the hearing on the Writ of Habeas Corpus (R. 25), and Appellee himself cooperated in every way with counsel for Appellant by delaying the induction of Appellant for a period of approximately 24 hours in an effort to aid Appellant in his ill-conceived attempt to test the validity of his Selective Service classification, (R. 24, 25). Counsel for Appellant now would have this Court believe that counsel for Appellee, Appellee and the Court below all conspired to deprive Appellant of his Constitutional rights. The Record shows clearly that such is not the fact, that the error, if any there be, has been committed by counsel for Appellant as a result of his scheming and delaying tactics. It should be pointed out that the liberty of the Appellant has not been taken away from him, and was not taken away from him, by the action of the lower Court or by the actions of Appellee herein or his counsel. Appellant is free at the present time and is not a member of the

Armed Forces, (R. 25, 26). Appellant still has many remedies available to him to test the validity of his classification in the event that he is so disposed. The Court below merely held that the Appellant's petition for Writ of Habeas Corpus was not proper. This conclusion of law by the lower Court did not operate to deprive Appellant of his Constitutional rights or of his liberty. We respectfully submit that the Judgment and Order of the lower Court is proper in all respects and should be upheld by this Court.

Respectfully submitted,

DALTON PIERSON,
United States Attorney for the District of Montana.

R. LEWIS BROWN, JR.,
Assistant U. S. Attorney for the District of Montana,
Butte, Montana.

APPENDIX

United States Code, Title 28.

Section 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned, a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law, the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965.

Selective Service Regulations.

Part 1603—Selective Service Personnel in General.

1603.1 Citizenship.—No person shall be appointed to any position, either compensated or uncompensated, in the Selective Service System, who is not a citizen of the United States.

1603.2 Voluntary Services.—Voluntary services in the administration of the selective service law may be accepted and should be encouraged.

1603.3 Uncompensated Services.—The services of registrars (except as the Director of Selective Service may otherwise provide), members of local boards, members of appeal boards, government appeal agents and associate government appeal agents, medical advisers to the local boards, medical advisers to the State Directors of Selective Service, advisers to registrants, interpreters, and all other persons volunteering their services to assist in the administration of the selective service law, shall be uncompensated, and no such person serving without compensation shall accept

remuneration, from any source, for services rendered in connection with selective service matters.

1603.4 Oath of Office and Other Forms.—(a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay (SSS Form No. 400).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall execute an oath of office in the form prescribed by the United States Civil Service Commission, Standard Form No. 61.

(c) Compensated and uncompensated personnel appointed for duty in the Selective Service System shall execute such other forms as are required by law. Executive order of the President, the regulations of the United States Civil Service Commission, or the Director of Selective Service.

(d) When executed in the manner hereinbefore provided, the Oath of Office and Waiver of Pay (SSS Form No. 400) and such other forms as may be required shall be filed in accordance with instructions issued by the Director of Selective Service.

1603.5 Termination of Appointment.—The appointof any deputy, officer, agent, employee, or other person engaged in the administration of the selective service law, whether with or without compensation, may be

terminated by resignation, death, or removal, or, in appropriate cases, by transfer or retirement.

1603.6 Removal.—(a) Any person, other than a compensated civilian officer or employee, engaged in the administration of the selective service law may be removed by the Director of Selective Service. The Governor may recommend to the Director of Selective Service the removal, for cause, of any person engaged in the administration of the selective service law in his State. The Director of Selective Service shall make such investigation of the Governor's recommendation as he deems necessary, and upon completion thereof shall take such action thereon as he deems proper.

(b) Any compensated civilian officer or employee engaged in the administration of the selective service law may be removed in accordance with the rules and regulations of the United States Civil Service Commission.

1603.7 Suspension.—The Director of Selective Service may suspend any deputy, officer, agent, employee, or other person engaged in the administration of the selective service law, pending his consideration of the advisability of removing any such person. Suspensions of persons entitled to veterans' preference under the Veterans' Preference Act of 1944, as amended, shall be in accordance with the regulations prescribed by the United States Civil Service Commission pursuant to that Act. During the period that any such person is

suspended, he shall be disqualified to act in his official capacity.

1603.8 Vacancies.—Vacancies may be filled in accordance with instructions issued by the Director of Selective Service.

INDUCTION

1632.14 Duty of Registrant to Report for and Submit to Induction.—(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the location where

his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board.

1632.15 Forwarding Registrants for Induction.—(e) The local board shall inform all registrants in the group that it is their duty to obey the instructions of the leader or assistant leaders during the time they are going to the place of induction; that they will be met by proper representatives of the armed forces at the place of induction; that while they are at the place of induction they will be subject to and must obey the orders of the representatives of the armed forces; that they must present themselves for and submit to induction; that, if they are rejected, the representatives of the armed forces will, to the extent prescribed by the regulations of the armed forces, provide transportation and subsistence for their return trip.